Supreme Court, U.S.
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NO. 92-196

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

LEONOR GARCIA, GARCIA
Petitioner,

vs.

THE TEXAS DEPARTMENT OF HUMAN SERVICES, et al.,
Respondent,

PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PETITIONER LEONOR GARCIA'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Petitioner **LEONOR GARCIA** refers this Honorable Court to the Petition for Writ of Certiorari with reference to the Questions presented for review, Parties to the Proceedings, Jurisdiction, Constitutional and Statutory Provisions Involved, Statement of Facts, and Primary Argument since this information remains essentially the same as stated in Petitioner's Writ of Certiorari.

REASON FOR GRANTING THE WRIT

ARGUMENT

I. UNITED STATES DISTRICT JUDGE EMILIO M. GARZA WAS BARRED FROM PRESIDING OVER AND RULING ON PETITIONER LEONOR GARCIA'S MOTION FOR SUMMARY JUDGMENT .

(Responsive to TDHS Brief, Argument I., Pages 4-6).

The Fifth Circuit improperly concluded that the Order signed by the Honorable Judge Edward C. Prado was unimportant and of no significance. To ignore the Order of the Court as Judge Emilio Garza did is a clear violation of said Order, and under the circumstances an abuse of discretion.

Indeed if an Order can be disposed of as if it does not exist, why have Orders to being with? Although the decision was allegedly based on administrative convenience, the Order should not have been ignored without granting Petitioner **LEONOR GARCIA** the opportunity to object and present her reasons for such a position.

Therefore, Judge Emilio Garza's ruling on the Motion For Summary Judgment is void and this Honorable Court should so hold.

II. PETITIONER LEONOR GARCIA'S CLAIM ARE NOT BARRED BY RES JUDICATA.

(Responsive to TDHS Brief, Argument II, Pages 6-11)

Respondent erroneously argues that the full forces of *res judicata* should apply to Petitioner. This position is without merit, as was the decision of the Fifth Circuit. The Court found that Petitioner **LEONOR GARCIA** failed to advance all her claims. This is not the case. Petitioner tried to amend the complaint in a timely manner, to avoid "splitting of the litigation",

and the full forces of *res judicata.*

Pursuant to F.R.C.P. 15, leave to amend is to be freely granted when justice so requires. In *Forman v. Davis*, 371 U.S. 178, 182, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962), the United States Supreme Court stated:

> "Rule 15 (a) Federal Rules of Evidence, declares that leave to amend shall be freely given when justice so requires'; this mandate is to be heeded. *See generally, Moore, Federal Practice*, (2d Ed. 1948) ¶ 15.08 ¶ 15.10. If the underlying facts or circumstance relief upon by a Plaintiff may be a proper subject of relied, he ought to be afforded an opportunity to test his claim on the merits. In the absence of an apparent or declared reason-such as undue delay, bad faith or dilatory motive on the part of the Movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.-the leave sought should, as the rules require, by freely given.

The opportunity to amend is with the sound discretion of the District Court, but outright refusal to grant the leave without any justifying reason is not an exercise of discretion *(emphasis ours)*. It is plainly an abuse of discretion and inconsistent with the spirit of F.R.C.P. 15 (a). *Forman v. Davis*, 371 U.S. 178, 182, 83 S. Ct. 227. *See also,* Zenith *Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 91 S. Ct. 795, 28 L. Ed. 2d 77 (1971) *(prejudice must be taken into account by trial court)*.

Respondent has argued that due to an "unexplained dilatoriness" on **LEONOR GARCIA'S** part, she split her causes of action. Now it argues that the trial court was justified in not granting Petitioner's leave to amend where she had been granted three previous opportunities to assert all claims and where she attempted to amend her complaint ninety-seven days following the Court imposed deadline. This is not true, and simply an

attempt by the Respondent to mislead this Court.

Petitioner **LEONOR GARCIA** filed her initial complaint on January 17, 1989. The Fourth Motion To Amend was timely filed on September 7, 1989, within eight months of the filing of the lawsuit, within twenty-one days *(emphasis ours)* of Respondent's late and untimely filing of its original answer on August 17, 1989, and well before the trial date of October 23, 1989. Moreover, the Scheduling Order permitted filing of all motions on or before September 15, 1989. This is previously what **LEONOR GARCIA** did to avoid the full force of res judicata and to properly submit all her claims before the Trial Court.

LEONOR GARCIA'S Fourth Motion to Amend was timely and would not have cause undue delay. The Respondent did not show that the granting of Petitioner's amendment would create undue hardship, was filed with an improper purpose or that Respondent would suffer any prejudice if the amendment was permitted, *Zenith Radio Corp. supra, at 87.* A showing of prejudice is required, there being none in this case, the Trial Court improperly did not take prejudice into account. This constitutes error.

Unlike the application to amend the complaint late in *Nelsen v. City of Moss Point, Miss.*, 707 F. 2d 556 (5th Cir. 1983) (en banc), **LEONOR GARCIA** amended her pleading in a timely manner. In *Nilsen supra,* at 563, Ms. Poe tried to amend her complaint on the first day of trial *(emphasis ours)*. In this case Petitioner **LEONOR GARCIA** did not wait until October 23, 1989, the scheduled trial date to amend. It is interesting to note that Respondent in its Response Brief not once even discussed *Nilsen, supra*. Thus, the facts of this case are readily distinguishable from those of *Nilsen*.

Case law supports Petitioner's position. She was entitled to amend her complaint to add a count alleging that the Respondent retaliated against her after she filed suit: since the

Respondent failed to show that it would suffer any prejudice if the amendment was permitted *Sturgess v. Negley*, 761 F. Supp. 1089 (D. Del 1991). Furthermore, delay alone does not warrant denial of leave to amend a pleading, *Howze v. Jones & Laughlin Steel Corp.* 750 F. 2d 1208, 1212 (3rd Cir. 1984), and in this case there is no evidence of any undue or unexplained delay indicating bad faith by Petitioner. *Sturgess, Supra*, at 1099.

Contrary to the Respondent's position, *res judicata* is not appropriate in this case. If the court rendering judgment through its procedural rules made it impossible to raise a claim, then it is not precluded by *res judicata*. *Browning v. Navarro* 887 F. 2d 553, 558 (5th Cir. 1989); *D-1 Enterprises, Inc. v. Commercial State Bank,* 864 F. 2d 36 38-39 (5th Cir. 1989). In this case, the procedural system of the forum precluded the joinder of all of Petitioner **LEONOR GARCIA'S** claims. See *Matter of Howe*, 913 F. 2d 1138, 1145 (5th Cir. 1990). **LEONOR GARCIA** should have been allowed to amend her complaint, but she was not allowed to do so. See *Langston v. Ins. Co. of North America*, 827 F. 2d 1044 (5th Cir. 1987).

As stated in the dissenting opinion in *Nilsen, supra*, at 565

> "The discretion given a court to deny an amendment is a valuable working tool. It is no more. Here reliance on that denial to bar adjudication of a constitutional claim conflicts with the first rule of the Federal Rules of Civil Procedure: "[The rules] shall be construed to secure the just, speedy, and inexpensive determination of every action". The decision of the Court en banc also conflicts with common sense. Putting to one side the quibbles associated with what constitutes a decision on the merits, it is evidence that Nilsen never had a day in court on the substance of her constitutional claim and that this claim failed to receive a just determination by this Court. I cannot stand aside and bow to injustice in the name of formalism *(emphasis ours)*.

The Fifth Circuit Court in this case has stood aside and has bowed to injustice in the name of formalism with its victim being a human being, Petitioner **LEONOR GARCIA**.

In sum, contrary to the Respondent's assertions, **LEONOR GARCIA** has not had her day in Court, and *Garcia II* was improperly barred by the doctrine of *res judicata*. The Trial Court clearly abused its discretion when it would not allow **LEONOR GARCIA** to timely amend her complaint to include all the causes of action. The Court "split the litigation" by improperly denying her Motion to Amend, thus precluding the effects of *res judicata*.

III. SUFFICIENT EVIDENCE WAS PRESENTED TO RAISE A GENUINE ISSUE OF MATERIAL FACT AS TO PETITIONER LEONOR GARCIA'S EQUAL PROTECTION AND DUE PROCESS CLAIMS.

(Responsive to TDHS Brief, Argument III, Pages 11-14)

(a.) EQUAL PROTECTION CLAIMS

Contrary to the Respondent's position, Petitioner **LEONOR GARCIA** presented sufficient evidence which would support her constitutional claims. Petitioner continues to maintain that the Fifth Circuit erroneously held that **LEONOR GARCIA** must prove up her claim without benefit of a trial by jury. Summary judgment was not appropriate in this case.

Petitioner did provide sufficient evidence of discriminatory or disparate treatment, intentional discrimination, discriminatory motive, or evidence to support her equal protection claims. The moving party *Byrnes* had the burden to identify those portions of pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits which she believed would demonstrate the absence of any genuine issue of material fact. Celotex Corp. v. Catrett, 91 L. Ed. 2d 265, at 274 (1986). Respondent clearly did not do this. Thus, the granting of Summary Judgment constitutes error.

LEONOR GARCIA did show that *Byrnes* subjected her to unequal treatment. Unlike her co-workers she was not afforded notice prior to termination, nor an exit interview. The lack of a hearing and the manner in which the exit interview was concluded amounts to a constitutional violation. Moreover, Respondent's actions were properly alleged to have been motivated by impermissible motives or illegitimate ends. Whether there was sufficient proof thereof can only be determined by a jury. **LEONOR GARCIA**, however, alleged and submitted sufficient proof to raise genuine issue of material facts concerning the actions of the Respondent.

Accordingly, the Court with respect to Petitioner **LEONOR GARCIA'S** equal protection claims erred in granting Respondent *Byrnes'* Motion For Summary Judgment.

(b.) DUE PROCESS CLAIMS

Respondent's position that Petitioner **LEONOR GARCIA** does not have a property interest in a promotion to the Clerk III position is not only error, but constitutes a misrepresentation of the facts to this Honorable Court. **LEONOR GARCIA** was entitled to be placed in the Clerk III position. Moreover, such a promotion or denial thereof constitutes a property interest *(emphasis ours)*.

As noted by the Supreme Court in *Bishop v. Wood*, 426 U.S. 341, 343-47, 96 S. Ct. 2074, 2076-79 (1976).

> The Due Process Clause provides 'nor shall any state deprive a person of life,liberty or property without due process of law.' In order to state a cause of action for violation of the Due Process Clause under Section 1983, the [plaintiff] must show that [she] had asserted a recognized 'liberty or property' interest within the purview of the Fourteenth Amendment; and that [she was] intentionally or recklessly deprived of that interest, even temporarily under color of state law.

Petitioner **LEONOR GARCIA** contrary to the Respondent's position was "entitled" to be placed in a Clerk III position which constitutes a property interest. Rule 1000-1924 of the TDHS' manual as correctly referred to by Respondent provides as follows; "The incumbent is promoted if [s] he meets minimum qualifications" *(emphasis ours)*. In the instant case the evidence establishes that Petitioner **LEONOR GARCIA** meets the minimum qualifications. Thus, she should have been automatically promoted to the Clerk III position.

Respondent *Byrnes* , intentionally and with malice having knowledge of the above mentioned rule, forced **LEONOR GARCIA** to complete for the Clerk III position, which was hers to begin with. (See Vol. 2, TR 289-90, 354,55). Furthermore, **LEONOR GARCIA'S** employment was terminated without prior notice. The Fourteenth Amendment due process clause and its guarantees apply to this case. *Board of Regents v. Roth*, 408 U.S. 564, 571, 92 S. Ct. 2701 (1972).

The primary requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all circumstances, to appraise interested parties of the pendency of an action and to afford them an opportunity to be heard. And such notice must be provided "at a meaningful time". *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S. Ct. 1187, 1191, 14 L. Ed 2d 62 (1965). The entire process must be consistent with "principles of right and justice" *Zambrano v. City of Tustin*, 885 F. 2d 1473, 1480 (9th Cir. 1989).

> "It is universally agreed that adequate notice lies at the heart of due process. Unless a person is adequately informed of the reasons for denial of a legal interest, a hearing serves no purpose and resembles more a scene from Kafka than constitutional process".
> *Cosby v. Ward*, 843 F. 2d 967, 982 (7th Cir. 1988).

Moreover, Respondent's argument that *Byrnes* is not at fault is meritless. *Byrnes'* conduct caused the deprivations.

On December 4, 1987, Respondent *Byrnes* through her actions intentionally and with malice knowing that **LEONOR GARCIA** was on workmen's compensation, terminated her employment. Conduct which amounts to callous indifferent is sufficient to find the actions to be intentional. *Lopez v. Houston Independent School District,* 817 F. 2d 351 (5th Cir. 1987).

The property interest in **LEONOR GARCIA'S** employment and automatic promotion is clear. The decision to have in house competition ran contrary to the mandate of § 1000-1924, thus a denial of due process. Even if the deprivation is temporary it violates due process. *Griffith v. Johnston,* 899 F. 2d 1427, 1435 (5th Cir. 1990).

Accordingly, the Fifth Circuit Court erred with respect to Petitioner's due process claims.

IV. PETITIONER LEONOR GARCIA PRESENTED SUFFICIENT EVIDENCE TO ESTABLISH A GENUINE ISSUE OF MATERIAL FACT AS TO HER TEXAS COMMON LAW TORT CLAIM OF INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS.

(Responsive to TDHS' Brief, Argument IV., Pages 15-18)

Respondent's position is this regard is utterly without foundation. *Byrnes'* action under the circumstances was extreme and outrageous, causing severe injury to **LEONOR GARCIA**. It was not a personnel decision made in the ordinary course of business. Assignment of Petitioner to the Filer-Puller position did constitute conduct so "outrageous in character and so extreme in degree, as to go beyond all possible bounds of decency..." *Wilson v. Monarch Paper Co.,* 939 F. 2d 1138, 1142 (5th Cir. 1991).

Under *Dean v. Ford Motor, Credit Co.,* 885 F. 2d 300 (5th Cir. 1989), and *Wilson supra* the conduct of *Byrnes* was outrageous in that there is ample proof that she intentionally disregarded the medical restrictions placed on Petitioner, thus

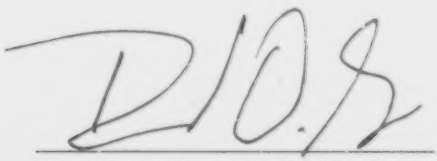
resulting in injury and culminating humiliation to **LEONOR GARCIA**. Petitioner suffers from severe emotional distress.

Petitioner **LEONOR GARCIA** placed all these issues at material controversy, therefore, the District Court erred in granting summary judgment on her claim of intentional infliction of emotional distress. The record before the Court was sufficient to create a genuine issue of material fact.

CONCLUSION

LEONOR GARCIA respectfully requests that this Honorable Court grant Petitioner's Writ of Certiorari.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned, attorney, a member of the Bar of this Court, certifies that pursuant to Rule 29.3, Supreme Court Rules, he served the within Petitioner's Reply to Respondent's Brief In Opposition to Petition for Writ of Certiorari on the Counsels for Respondent by enclosing a copy thereof in an envelope, with first-class postage prepaid, addressed to counsel of record at their post office address:

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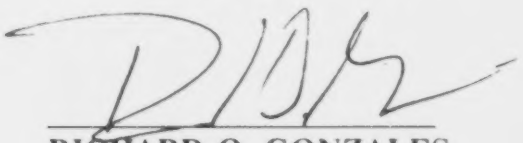
and depositing same in the United States Post Office at Uvalde, Texas on September 10th 1992, and further certifies that all parties required to be served have been served.

Respectfully submitted,



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